

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JAMES CHAVEZ,

Case No. 3:13-cv-00548-MMD-WGC

Petitioner,

v.

ORDER

LeGRAND, WARDEN, et al.,

Respondents.

Before the Court for a decision on the merits is petitioner Chavez's amended petition for writ of habeas corpus under 28 U.S.C. § 2254 (ECF No. 22).

I. BACKGROUND¹

In November 2006, a jury in the Second Judicial District Court for Nevada found Chavez guilty of four counts of sexual assault on a child. The victim of the assaults was Chavez's daughter. The state district court sentenced Chavez to four consecutive terms of life in prison with minimum parole eligibility after twenty years on each count. Chavez appealed.

On direct appeal, Chavez raised claims asserting violations of the Confrontation Clause of the Sixth Amendment, violations of Nevada's rules of evidence, a claim of juror misconduct, and a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. The Nevada Supreme Court affirmed Chavez's conviction and sentence.

¹The background information for this case was taken from the exhibits filed at ECF Nos. 16 through 21 and this Court's own docket entries.

1 Chavez subsequently filed a proper person petition for writ of habeas corpus. After
2 appointment of counsel, Chavez filed a supplemental petition. The state court held an
3 evidentiary hearing, and then entered an order denying the state petition. Chavez
4 appealed.

5 On appeal, Chavez raised various claims of ineffective assistance of counsel, and
6 asserted a claim of cumulative error. The Nevada Supreme Court affirmed the state
7 district court's order denying the state petition.

8 On October 2, 2013, this Court received a federal habeas petition from Chavez
9 initiating this proceeding. On December 23, 2013, Chavez filed, with the assistance of
10 appointed counsel, an amended petition. Pursuant to a motion to dismiss filed by
11 respondents, the Court issued an order for Chavez to show cause why Ground Two of
12 his amended petition should not be dismissed as procedurally defaulted. After this Court
13 found Chavez could not make such a showing and dismissed the claim, respondents filed
14 an answer to Grounds One and Three. Chavez subsequently filed his reply. Grounds One
15 and Three are now before the Court for a decision on the merits.

16 **II. STANDARDS OF REVIEW**

17 This action is governed by the Antiterrorism and Effective Death Penalty Act
18 (AEDPA). 28 U.S.C. § 2254(d) sets forth the standard of review under AEDPA:

19 An application for a writ of habeas corpus on behalf of a person in
20 custody pursuant to the judgment of a State court shall not be granted with
21 respect to any claim that was adjudicated on the merits in State court
proceedings unless the adjudication of the claim —

22 (1) resulted in a decision that was contrary to, or involved an
23 unreasonable application of, clearly established Federal law, as determined
by the Supreme Court of the United States; or

24 (2) resulted in a decision that was based on an unreasonable
25 determination of the facts in light of the evidence presented in the State
court proceeding.

26 28 U.S.C. § 2254(d).

27 A decision of a state court is “contrary to” clearly established federal law if the state
28 court arrives at a conclusion opposite that reached by the Supreme Court on a question

1 of law or if the state court decides a case differently than the Supreme Court has on a set
2 of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). An
3 “unreasonable application” occurs when “a state-court decision unreasonably applies the
4 law of [the Supreme Court] to the facts of a prisoner’s case.” *Id.* at 409. “[A] federal habeas
5 court may not “issue the writ simply because that court concludes in its independent
6 judgment that the relevant state-court decision applied clearly established federal law
7 erroneously or incorrectly.” *Id.* at 411.

8 The Supreme Court has explained that “[a] federal court’s collateral review of a
9 state-court decision must be consistent with the respect due state courts in our federal
10 system.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). The “AEDPA thus imposes a
11 ‘highly deferential standard for evaluating state-court rulings,’ and ‘demands that state-
12 court decisions be given the benefit of the doubt.’” *Renico v. Lett*, 559 U.S. 766, 773
13 (2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997); *Woodford v. Viscotti*,
14 537 U.S. 19, 24 (2002) (per curiam)). “A state court’s determination that a claim lacks
15 merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the
16 correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011)
17 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has
18 emphasized “that even a strong case for relief does not mean the state court’s contrary
19 conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003));
20 *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA standard
21 as “a difficult to meet and highly deferential standard for evaluating state-court rulings,
22 which demands that state-court decisions be given the benefit of the doubt”) (internal
23 quotation marks and citations omitted).

24 “[A] federal court may not second-guess a state court’s fact-finding process unless,
25 after review of the state-court record, it determines that the state court was not merely
26 wrong, but actually unreasonable.” *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004);
27 *see also Miller-El*, 537 U.S. at 340 (“[A] decision adjudicated on the merits in a state court
28 and based on a factual determination will not be overturned on factual grounds unless

1 objectively unreasonable in light of the evidence presented in the state-court proceeding,
2 § 2254(d)(2).”). Because *de novo* review is more favorable to the petitioner, federal courts
3 can deny writs of habeas corpus under § 2254 by engaging in *de novo* review rather than
4 applying the deferential AEDPA standard. *Berghuis v. Thompson*, 560 U.S. 370, 390
5 (2010).

6 **III. DISCUSSION**

7 **A. Ground One**

8 In Ground One, Chavez alleges that the state trial court violated his rights under
9 the Confrontation Clause of the Sixth Amendment by admitting statements by the
10 deceased victim, which included her preliminary hearing testimony, her video-taped
11 statements to the police, and other statements to law enforcement.

12 Under the Confrontation Clause of the Sixth Amendment, testimonial statements
13 of witnesses not present at a trial are admissible “only where the declarant is unavailable,
14 and only where the defendant has had a prior opportunity to cross-examine.” *Crawford v.*
15 *Washington*, 541 U.S. 36, 59 (2004). “To be sure, the Clause’s ultimate goal is to ensure
16 reliability of evidence, but it is a procedural rather than a substantive guarantee.” *Id.* at
17 61. The Confrontation Clause guarantees only “an opportunity for effective cross-
18 examination, not cross-examination that is effective whatever way, and to whatever
19 extent, the defense might wish.” *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

20 The victim in this case, Chavez’s daughter, testified at the preliminary hearing but
21 died prior to trial. Chavez filed a pre-trial motion to dismiss premised on an argument that
22 her preliminary hearing testimony and her statements to law enforcement, family
23 members, and various health care providers were all inadmissible at trial because the
24 presentation of such evidence would violate either the Confrontation Clause or rules of
25 evidence prohibiting the introduction of hearsay. (ECF No. 16-7.) The trial court ruled that
26 statements the victim made to “the forensic nurse and to her siblings would not be
27 admitted, but that the preliminary hearing testimony and statements the victim made to
28 law enforcement was admissible because Chavez had an opportunity to cross-examine

1 her on those statements at the preliminary hearing. (ECF No. 16-14, p. 25-26.)² With
2 respect to statements the victim made to her mother, the court suggested that those
3 statements would most likely be admissible at trial. *Id.* at 26-27.

4 At trial, the victim's preliminary hearing testimony was read to the jury. (ECF No.
5 17-1 at 146-48.) In addition, a police sergeant (Dreelan) testified that the victim had told
6 him that her father had sexually assaulted her the day before he interviewed her. (ECF
7 No. 17 at 104.) The prosecution was also permitted to play a videotape of a police
8 detective (Armitage) interviewing the victim about the sexual assaults and present the
9 detective's testimony about what the victim told her during a second interview. (ECF No.
10 17-1 at 153, 157-59.) A marriage and family therapist (Evarts) who treated the victim,
11 testified that the victim had told her "that at five years old, her dad had ripped open her
12 vagina." (ECF No. 16-16 at 35-36.)

13 On direct appeal, Chavez argued that it was constitutional error for the trial court
14 to admit into evidence (1) the preliminary hearing testimony, (2) the videotape of the
15 interview and the victim's statements to Dreelan and to Armitage, and (3) the victim's
16 statements to Evarts.

17 In denying Chavez's Confrontation Clause claim, the Nevada Supreme Court first
18 discussed the rule announced in *Crawford*, then surveyed its own Confrontation Clause
19 jurisprudence. *Chavez v. State*, 213 P.3d 476, 483 (Nev. 2009). With respect to the trial
20 court's admission of the preliminary hearing testimony and the victim's statements to law
21 enforcement, the court determined that the statements were testimonial and that the
22 declarant was unavailable at the time of trial. *Id.* at 484, 486.

23 As for the defendant's opportunity to cross-examine the witness, the Nevada
24 Supreme Court stated as follows:

25 Chavez argues that the limited nature of a preliminary hearing does
26 not provide a defendant an adequate opportunity to cross-examine a
witness appearing against him. He urges this court to adopt the standards

27 ²References to page numbers for documents on the Court's electronic docket are
28 based on CM/ECF pagination.

1 set forth in *People v. Fry*, 92 P.3d 970 (Colo.2004), and *State v. Stuart*, 279
2 Wis.2d 659, 695 N.W.2d 259 (2005). Both cases are inapposite.

3 In *Fry*, the Colorado Supreme Court found that a defendant's
4 opportunity to cross-examine a witness during a preliminary hearing was
5 not adequate for Confrontation Clause purposes because of "the limited
6 nature of the preliminary hearing" in that state. 92 P.3d at 976-77 (explaining
7 that in Colorado a "preliminary hearing is limited to matters necessary to a
8 determination of probable cause"). In contrast, Nevada law is generally
9 more permissive with regard to a defendant's right to discovery and cross-
10 examination at the preliminary hearing. See NRS 171.196(5) ("The
11 defendant may cross-examine witnesses against him and may introduce
12 evidence on his own behalf."); NRS 171.1965(1) (stating that, before the
13 preliminary hearing, the defendant is entitled to written or recorded
14 statements by the defendant or a witness, reports, and other evidence
15 within the prosecutor's custody or possession). We do not find anything in
16 our state law that would hinder a defendant's opportunity to cross-examine
17 a witness at a preliminary hearing.

18 In *Stuart*, the Wisconsin Supreme Court reversed a murder
19 conviction, finding that the district court had erroneously admitted the
20 preliminary hearing testimony of the defendant's brother. 695 N.W.2d at
21 267. During the preliminary hearing, the magistrate ruled that pursuant to
22 Wisconsin law, the defense could not ask the brother a question that was
23 meant to cast doubt on the brother's credibility at the preliminary hearing
24 stage. *Id.* At trial, the brother became unavailable, and the court admitted
25 his preliminary hearing testimony. *Id.* The Wisconsin Supreme Court
26 reversed, determining that, at the trial level, a defendant had a right to
27 question a witness's motive and credibility and, therefore, admitting the
28 preliminary testimony violated the defendant's right to confrontation. *Id.*

Unlike Wisconsin, Nevada law does not preclude a defendant from
questioning a witness's credibility or motive during a preliminary hearing.
While the defendant in *Stuart* could not question the witness's credibility and
motive, Chavez questioned D.C.'s credibility in a wide-ranging cross-
examination.

Chavez's cross-examination of D.C. at the preliminary hearing
consisted of almost double the amount of questions that were asked on
direct examination. D.C. testified under oath and in Chavez's presence. At
the time Chavez conducted the cross-examination, nearly all the discovery
was complete. In fact, most of Chavez's extensive cross-examination
consisted of questions based upon statements that D.C. had made to
authorities about the sexual abuse. Specifically, we note that Chavez had a
copy of D.C.'s videotaped statements to police, as well as a list of the
witnesses that would be testifying during the State's case in chief.
Therefore, Chavez had most, if not all, of the pertinent facts of the State's
case in chief at the preliminary hearing.

Chavez used the discovery to ask D.C. specific questions about the
molestation, including details about each instance of abuse, the description
of her father's penis, and how she cleaned up afterwards by using socks.
He questioned D.C.'s veracity and motives by repeatedly asking her
whether she told specific people about the sexual abuse during the five
years that it was ongoing. Chavez asked D.C. whether her brothers or her

1 sister ever saw the sexual abuse and about the conversation in the car
2 between D.C., her siblings, and Block, and how and why D.C. told her
3 mother about the abuse. Chavez asked D.C. specific questions about her
4 parents' relationship. He further questioned D.C. about the alleged accident
on the fence post and how it led to her initial injuries. He even asked D.C. if
she was seeing a therapist.

5 These questions were only part of the 240 questions Chavez asked
6 D.C. The record leaves no doubt in our minds that the preliminary hearing
7 afforded Chavez an opportunity to cross-examine the unavailable witness,
8 D.C., on the statements that she had made to her mother, health care
9 providers, and law enforcement officers regarding the sexual abuse. The
10 nature of the cross-examination was extensive and thorough because the
11 defense took, and the magistrate judge allowed, full advantage of the
12 opportunity to cross-examine. In fact, the magistrate judge only interrupted
13 Chavez's cross-examination once, when Chavez asked D.C. a series of
14 questions about her mother's new boyfriend. And, even then, the magistrate
judge said that he would not allow the line of questioning unless counsel
could explain its relevance. Chavez simply moved on to other questions.
There is no evidence that the magistrate judge placed any inappropriate
restrictions on the scope of Chavez's cross-examination of D.C. Rather, the
record shows, save for one appropriate admonishment, the magistrate
judge allowed Chavez to extensively question D.C. on all the key pieces of
evidence the State had obtained against Chavez. Because discovery was
almost entirely complete, Chavez was able to take full advantage of the
opportunity to cross-examine the State's key witness against him at the
preliminary hearing.

15 Therefore, in this instance, because the discovery was almost
16 entirely complete and the magistrate judge allowed Chavez unrestricted
17 opportunity to confront D.C. on all the pertinent issues, we conclude that
Chavez's Confrontation Clause rights were not violated by the admission of
D.C.'s preliminary hearing testimony at trial.

18 *Id.* at 48-86 (footnote omitted).

19 Then, with respect to the victim's statements to law enforcement, the Nevada
20 Supreme Court held as follows:

21 The only remaining issue is whether Chavez had opportunity to
22 cross-examine D.C. regarding the videotaped testimony and her other
23 statements to police. Because of discovery, Chavez had the statements that
24 D.C. made to Detective Armitage and Sergeant Dreelan, including a copy
25 of the videotape, before the preliminary hearing. Chavez, therefore, had the
26 opportunity to confront D.C. on all of her statements to law enforcement
27 officers at the preliminary hearing. Whether he questioned D.C. on each
28 and every statement is not the relevant inquiry, as the Confrontation Clause
only guarantees the opportunity to cross-examine, not a cross-examination
in whatever way the defense might wish. As we have already concluded,
Chavez was afforded an adequate opportunity to confront D.C. at the
preliminary hearing. The breadth and scope of Chavez's cross-examination
did not run afoul of the Confrontation Clause because of the nearly complete
discovery available to Chavez at the time and manner in which the
magistrate judge allowed the cross-examination to proceed.

1 *Id.* at 486.

2 The question before this Court is whether the Nevada's Supreme Court's
3 adjudication of Chavez's Confrontation Clause claim resulted in a decision that was
4 contrary to, or involved an unreasonable application of, clearly established Federal law,
5 as determined by the Supreme Court of the United States.³ The parties do not dispute
6 that the statements at issue were testimonial or that the victim was unavailable to testify
7 at trial.⁴

8 Thus, the inquiry here focuses on the Nevada Supreme Court's determination that
9 Chavez had, for the purposes of *Crawford*, an opportunity to cross-examine the victim.
10 On this particular point, the Supreme Court has provided little guidance as to the types of
11 proceedings that do or do not qualify as providing a defendant with a sufficient opportunity
12 for cross-examine for the purposes of *Crawford*. However, prior to *Crawford*, the Court
13 rejected the notion that the fundamental differences between a preliminary hearing and a
14 trial disqualified it from providing an adequate opportunity. See *Ohio v. Roberts*, 448 U.S.
15 56, 73 n. 12 (1980) (holding that, in the absence of "extraordinary" circumstances, the
16 opportunity for cross-examination at a preliminary hearing is sufficient to satisfy the cross-
17 examination requirement); *abrogated on other grounds by Crawford*, 541 U.S. 36.

18 In addition, a decision on point from the Court of Appeals for the Sixth Circuit
19 provides sound guidance here. In *Williams v. Bauman*, 759 F.3d 630 (6th Cir. 2014), as
20 in this case, a witness to the charged crimes testified at the defendant's preliminary
21 hearing, but died before trial. 759 F.3d at 634. The state appellate court in *Williams*, as in
22 this case, concluded that the trial court did not violate the defendant's right to

23 ³Chavez makes no argument, nor is there any indication, that he Nevada Supreme
24 Court's rejection of this claim was based on an unreasonable determination of the facts
in light of the evidence presented in the State court proceeding.

25 ⁴With respect to the victim's statements to Evarts, the Nevada Supreme Court
26 determined that the statements were non-testimonial and admissible under NRS §
27 51.115, which provides for the admission of hearsay statements "made for purposes of
28 medical diagnosis or treatment and describing medical history, or past or present
symptoms, pain or sensations, or the inception or general character of the cause or
external source thereof." *Id.* at 486-87. Chavez does not challenge that determination in
his habeas petition or in his reply brief.

1 confrontation by allowing the witness's preliminary hearing testimony to be read to the
2 jury. *Id.* at 634.

3 On habeas review, the Sixth Circuit noted that, in a recent case, it had "observed
4 that 'there is some question whether a preliminary hearing necessarily offers an adequate
5 prior opportunity for cross-examination for Confrontation Clause purposes.'" *Id.* at 636
6 (citing *Al-Timimi v. Jackson*, 379 Fed. Appx, 435, 437 (6th Cir.2010)). The court then
7 reasoned:

8 If there is room for reasonable debate on the issue, the state court's
9 decision to align itself with one side of the argument is necessarily beyond
this court's power to remedy under § 2254, even if it turns out to be wrong.

10 *Id.* (citing *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014)).

11 In the Ninth Circuit there is no published opinion that definitively settles the issue,⁵
12 but unpublished decisions favor the conclusion that a preliminary hearing,
13 notwithstanding its fundamental difference from a trial, provides an adequate opportunity
14 for cross-examination for the purposes of *Crawford*. See, e.g., *Cogswell v. Kernan*, 648
15 F. App'x 624, 626 (9th Cir.), *cert. denied*, 137 S. Ct. 452, 196 L. Ed. 2d 334 (2016). At a
16 minimum, there is at least "room for reasonable debate" on the issue. Thus, as in *Williams*,
17 this Court must defer to the Nevada Supreme Court's decision to reject Chavez's
18 Confrontation Clause claim.

19 Ground One is denied.

20 **B. Ground Three**

21 In Ground Three, Chavez alleges that he was deprived of effective assistance of
22 counsel, in violation of his rights under the Sixth Amendment, because counsel (1) failed
23 to object to certain prejudicial statements by the prosecutor; (2) failed to object to the
24 admission of statements the victim made to her therapist; (3) asked the therapist on cross-
25 examination whether she thought the victim had been coached, thereby allowing the

26 ⁵Chavez cites only to the two state court cases discussed in the Nevada Supreme
27 Court opinion — *Stuart* and *Fry* — as instances in which a reviewing court concluded that
28 a preliminary hearing did not provide a defendant with an opportunity for cross-
examination as contemplated in *Crawford*. (ECF No. 60.)

1 therapist to vouch for the victim's credibility; (4) failed to object to the admission of autopsy
2 photographs of the victim; and (5) failed to object to the State's inclusion of a theory of
3 liability based on events that occurred on the Paiute Indian reservation.

4 In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded
5 a two prong test for analysis of claims of ineffective assistance of counsel ("IAC"): a
6 petitioner claiming ineffective assistance of counsel must demonstrate (1) that the
7 defense attorney's representation "fell below an objective standard of reasonableness,"
8 and (2) that the attorney's deficient performance prejudiced the defendant such that "there
9 is a reasonable probability that, but for counsel's unprofessional errors, the result of the
10 proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.

11 1. *Prosecutor's statements and victim's statements to therapist*

12 The statements underlying Chavez's first IAC claim are (1) the prosecutor's
13 comment during opening argument that the victim had told her mother that Chavez "laid
14 me on the floor like a baby changing my diaper and shoved his penis inside of me, and I
15 tore," and (2) the prosecutor's references, while questioning witnesses, to Chavez
16 "jamming" his penis into the victim. (ECF No. 16-16 at 15, ECF No. 18 at 87, ECF No. 19
17 at 115.)

18 The statement underlying Chavez's second IAC claim is Evart's comment during
19 her testimony that the victim had told her that Chavez "ripped open her vagina." (ECF No.
20 16-16 at 35-36.)

21 Chavez presented these instances of alleged IAC for failure to object as one claim
22 in his state post-conviction proceeding. (ECF No. 21-4 at 11-13.) The Nevada Supreme
23 Court addressed the claim as follows:

24 Chavez argues that counsel was ineffective for failing to object to
25 prejudicial statements made by the prosecutor and a witness. Chavez failed
26 to demonstrate deficiency or prejudice. The statements that Chavez asserts
27 counsel should have objected to were direct quotes from the victim
28 describing what happened to her and the language used accurately
described the incidents as alleged and were not inflammatory. Accordingly,
Chavez failed to demonstrate that counsel was ineffective for failing to
object on this ground.

1 (ECF No. 21-7 at 3.)

2 2. *Coaching question on cross-examination*

3 With respect to Chavez's allegation that counsel was opening the door for
 4 impermissible vouching, defense counsel asked Evarts the following question on cross-
 5 examination: "You did not give — in your treatment and meetings with [the victim], ever
 6 entertain the premise that she had not been molested, did you?" (ECF No. 16-16 at 48.)⁶
 7 In response, Evarts stated that she recognized that children she treated were not always
 8 telling the truth, but, in this case, "I did not for — I mean, for a minute, think she was lying."
 9 (*Id.*) Then, on redirect examination, the prosecutor asked Evarts several questions as to
 10 whether she considered the possibility the victim was not telling the truth, including the
 11 possibility the victim had been coached. (*Id.* at 54-60.)

12 On direct appeal, the Nevada Supreme Court rejected Chavez's claim that the trial
 13 court erred in not granting defense counsel's motion for a mistrial based on impermissible
 14 vouching by Evarts. *Chavez*, 213 P.3d at 487 n.2. In particular, the court concluded that,
 15 "Evarts' testimony went to her observations of [the victim] as compared to other children
 16 she had treated, not to the veracity of [the victim's] allegations." *Id.*

17 In Chavez's state post-conviction proceeding, the Nevada Supreme Court held as
 18 follows:

19 Chavez argues that counsel was ineffective for opening the door for
 20 an expert witness to vouch for the victim's veracity. Chavez failed to
 21 demonstrate deficiency or prejudice. On direct appeal, this court stated that
 22 the expert's testimony did not go to the veracity of the victim's allegations
 23 and was not vouching. *Chavez v. State*, 125 Nev. 328, 343 n. 2, 213 P.3d
 476, 487 n. 2 (2009). Accordingly, Chavez failed to demonstrate that
 counsel was ineffective for failing to preclude the admission of this
 testimony.

24 (ECF No. 21-7 at 3.)

25 ///

26 ⁶Chavez alleges in his petition that defense counsel "asked Ms. Evarts whether
 27 she believed [the victim] could have been coached." (ECF No. 22 at 20.) However, he
 28 does not cite to (nor is the Court able to find) where in the record defense counsel asked
 this specific question.

1 3. *Admission of autopsy photographs*

2 At trial, the State presented autopsy photographs of the victim for the purpose of
3 demonstrating injuries to her vaginal area. (ECF No. 17-1 at 92-93.) According to Chavez,
4 counsel was ineffective in not objecting to the admission of these photographs because
5 they invited the jury to speculate as to the victim's cause of death.
6

7 The Nevada Supreme Court addressed this claim as follows:

8 Chavez argues that counsel was ineffective for failing to object to the
9 introduction of photographs of the victim's vagina taken during her autopsy
10 because it allowed the jury to infer that he was responsible for the victim's
11 death. Chavez failed to demonstrate deficiency or prejudice. Jurors were
12 already informed that the victim was unavailable because she was
deceased and were instructed not to draw any inferences from her death.
See *McConnell v. State*, 120 Nev. 1043, 1062, 102 P.3d 606, 619 (2004)
(presuming that jurors follow the instructions they are given). Accordingly,
Chavez failed to demonstrate that counsel was ineffective for failing to
object to the autopsy photographs on this ground.

13 (ECF No. 21-7 at 4.)

14 4. *Events on Indian reservation*

15 Chavez contends that the State filed amended charging documents that expanded
16 the time period of the charged conduct to include events that could have only occurred
17 on tribal land. He further contends that, because he and his children are members of the
18 Paiute tribe, the State did not have jurisdiction over the alleged conduct. Accordingly, he
19 claims that trial counsel was ineffective in failing to object to the amended charging
20 documents.

21 Chavez argues that counsel was ineffective for failing to object to the
22 mention of an incident that occurred on tribal land. During opening
23 statements, the prosecutor relayed the victim's description of an incident in
24 which Chavez tore her vagina during a sexual assault and convinced her to
25 tell the family that she injured it on a fence. Chavez asserts that because
26 the jury asked multiple questions about the incident, which the State had no
27 authority to prosecute because it occurred on tribal land, it likely found him
28 guilty of that act rather than an act which was charged. Chavez failed to
demonstrate deficiency or prejudice. In finding Chavez guilty, jurors found
that each act was committed in Washoe County beyond a reasonable
doubt. Further, counsel testified at the evidentiary hearing that had the State
not referenced the act, he would have because Chavez's claim that the
victim fell on a fence explained how she sustained vaginal injuries and was
the crux of his defense. *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d
278, 280-81 (1996) (noting that counsel's strategy on how to proceed at trial

1 is a decision that is “Virtually unchallengeable absent extraordinary
 2 circumstances.” (quoting *Howard v. State*, 106 Nev. 713, 722, 800 P.2d
 3 175, 180 (1990)) *abrogated on other grounds by Harte v. State*, 116 Nev.
 1054 n. 6, 13 P.3d 420, 432. n. 6 (2000)). Accordingly, Chavez failed to
 demonstrate that counsel was ineffective for failing to object on this ground.

4 (ECF No. 21-7 at 2-3.)

5 The Nevada Supreme Court applied the correct federal law standard — i.e.,
 6 *Strickland* — to each of Chavez’s IAC claims. Chavez has not demonstrated that any of
 7 the state court’s decisions discussed above constituted an unreasonable application of
 8 *Strickland* or was based on an unreasonable determination of the facts.⁷ Accordingly, this
 9 Court must deny Ground Three.

10 **IV. CONCLUSION**

11 For the reasons set forth above, Chavez’s amended petition for habeas relief is
 12 denied.

13 *Certificate of Appealability*

14 This is a final order adverse to the petitioner. As such, Rule 11 of the Rules
 15 Governing Section 2254 Cases requires this Court to issue or deny a certificate of
 16 appealability (COA). Accordingly, the Court has *sua sponte* evaluated the claims within
 17 the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v.*
 18 *Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

19 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner
 20 “has made a substantial showing of the denial of a constitutional right.” With respect to
 21 claims rejected on the merits, a petitioner “must demonstrate that reasonable jurists would
 22 find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack*
 23 *v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4
 24 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate
 25 (1) whether the petition states a valid claim of the denial of a constitutional right and (2)
 26 whether the court’s procedural ruling was correct. *Id.*

27 _____
 28 ⁷Indeed, Chavez does not address the merits of Ground Three at all in his reply
 brief. (ECF No. 60.)

1 Having reviewed its determinations and rulings in adjudicating Chavez's petition,
2 the Court finds that reasonable jurists could debate the Court's resolution of Ground One,
3 above. Specifically, it is at least arguable that the Nevada Supreme Court unreasonably
4 applied clearly established federal law in determining that the trial court did not violate
5 Chavez's right to confrontation in admitting statements made by the deceased victim.
6 The Court declines to issue a certificate of appealability for its resolution of any other
7 procedural or substantive issue.


8 It is therefore ordered that petitioner's amended petition for writ of habeas corpus
9 (ECF No. 22) is denied. The Clerk will enter judgment accordingly.

10 It is further ordered that a certificate of appealability is granted as to the following
11 issue:

12 Whether this Court erred in its resolution of Ground One by
13 concluding that it must defer to the Nevada Supreme Court's decision that
14 Chavez's rights under the Confrontation Clause were not violated by the
admission at trial of statements made by the deceased victim.

15 It is further ordered that all pending motions for extension of time (ECF Nos. 51,
16 52, 53, 56, 57, 58, 59) are granted *nunc pro tunc* as of their respective filing dates.

17 DATED THIS 22nd day of February 2017.

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20 MIRANDA M. DU
21 UNITED STATES DISTRICT JUDGE
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